

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
	Respondent,)
v.)	
)	
BRIAN ZANE WINTER,)	
	<u>Appellant.</u>)
STATE OF WASHINGTON,)	
	Respondent,)
v.)	NO. 64947-7-I
)	DIVISION ONE
RIGOBERTO JESUS CONTRERAS,)	
)	
	<u>Appellants.</u>)
STATE OF WASHINGTON,)	
	Respondent,)
v.)	
)	
TOBY KEVIN ANDERSON, JR.,)	
	<u>Appellants.</u>)
STATE OF WASHINGTON,)	
)	
	Respondent,)
v.)	UNPUBLISHED OPINION
)	FILED: May 24, 2010
TIMOTHY LEE BAXTER, JR.,)	
	<u>Appellants.</u>)
STATE OF WASHINGTON,)	
)	
	Respondent,)
v.)	
)	
JASON LEE WOODS,)	
	<u>Appellants.</u>)

Lau, J. — In these consolidated appeals, Brian Winter, Rigoberto Contreras,

Jason Woods, Toby Anderson, and Timothy Baxter appeal their jury trial convictions for first degree robbery and second degree vehicle prowling. The jury also found the defendants were armed with a firearm while committing the robbery and convicted Woods of unlawful firearm possession. The defendants claim insufficient evidence supports the firearm finding and their trial counsel's failure to object to admission of a gun found near the scene constitutes deficient performance. They also allege several instructional errors and other constitutional violations. We conclude sufficient evidence supports the firearm enhancement and underlying convictions, counsel rendered effective assistance, and any errors were harmless. Accordingly, we affirm.

FACTS

At trial, witnesses testified as follows: On the morning of November 18, 2008, Cary Swofford awoke to see several men surrounding her trailer. One man approached her door and said he wanted to talk about his mother. She did not know him and had no idea what he was talking about. She refused to open the door because "he looked like a gangbanger." 3 Report of Proceedings (RP) (Feb. 4, 2009) at 348.

Russell Molnar, who had been sleeping on Swofford's sofa, testified that she woke him up and was in a very excited state. He saw people running around the side of the trailer and cars parked in front. The man at the door reiterated that he wanted to come in and talk about his mother. Molnar refused to open the door. At that point, the men became "aggressive." 2 RP (Feb. 3, 2009) at 225. Molnar said they were "ranting and raving," and two of them got into one of the cars, a Ford Explorer. 2 RP at 225.

Molnar decided to go outside because "they didn't need to be in there." 2 RP at 245. But as he began unfastening the

door locks, the man outside tried to open the door. Swofford relocked the door and told Molnar not to go outside. She was scared because of the way the men were behaving.

Swofford and Molnar could see some of what was happening from a security camera video Swofford had installed because of problems with her neighbors. But they could not see everything due to the poor video quality, which caused activity beyond 25 feet to appear blurry. Molnar testified that he saw one of the men pull something out of the car. From the camera, it "looked like a gun, a rifle." 2 RP at 228. And "It looked like they cocked the gun and it looked like they were going to shoot at the door." 2 RP at 234. Although Swofford said she did not personally see a gun, she was frightened because she thought one of the men might have a gun based on the way he was standing. Molnar testified he was scared and called 911, but the men left before the police arrived. Swofford said they jumped into a small blue car and drove away. After the men left, Swofford discovered they had taken the Explorer's stereo and compact disc player.

While en route to the scene, Thurston County Sheriff's Deputy Cameron Simper saw a blue Datsun, full of passengers, driving in the opposite direction. He made a u-turn, stopped the car, and noted five men crammed inside. He identified Contreras as the driver, Woods as the front seat passenger, and Baxter, Anderson, and Winter in the back seat. He saw a car stereo and compact disc player on the front passenger floorboard. At that point, he did not see a gun in the car. But when he searched the area later that morning, he found a sawed-off, 12-gauge shotgun lying in a ditch. Deputy Simper testified that Woods told him he threw the gun out the window after someone in the back seat passed it to him

and told him to get rid of it. During trial, the court admitted the gun as State's exhibit 25. While Molnar did not believe it was the gun he saw from the security camera, he acknowledged he had not seen the gun up close, and he was sure he saw a gun.

Thurston County Sheriff's Deputy Kyle Kempke testified that Woods appeared nervous when he recovered the gun. Deputy Kempke drove Swofford and Molnar to the scene of the roadway stop for a show-up identification. He said they both identified Woods as the person who held the gun and they also recognized Winter and Contreras.

The State charged all five defendants with first degree robbery, attempted first degree burglary, first degree unlawful possession of a firearm, and second degree vehicle prowling. Additionally, the State alleged that the defendants, as either principals or accomplices, were armed with a firearm while committing the robbery and burglary. In a consolidated trial, the jury convicted all the defendants of first degree robbery and second degree vehicle prowling and returned a special verdict finding they were all armed with a firearm. The jury also found Woods guilty of unlawful firearm possession. The defendants appeal.

ANALYSIS

Firearm Enhancement

Under RCW 9.94A.533(3), a sentencing court must impose a firearm enhancement whenever an offender or an accomplice was armed with a firearm during the commission of an enhancement-eligible crime.¹ But the defendants argue their

¹ First degree robbery, a class A felony, is such a crime. RCW 9A.56.200(2);

enhancements must be vacated because insufficient evidence supports the jury's finding that the gun Deputy Simper found was a "firearm." In particular, they argue the gun does not meet the statutory definition for firearms because mechanical defects made it inoperable.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are reserved to the trier of fact. State v. Mines, 163 Wn.2d 387, 179 P.3d 835 (2008). In sum, evidence is sufficient if, after viewing it in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

RCW 9.41.010(1) defines a "firearm" as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." This language has been interpreted to require a gun to be operable at some point in order to qualify as a firearm, but not necessarily during commission of the crime. See, e.g., State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999) (disassembled pistol qualified as a firearm because it "may be fired" if reassembled); State v. Anderson, 94 Wn. App. 151, 159, 971 P.2d 585 (1999) (noting that unloaded guns are considered firearms even though they are not immediately operable), rev'd on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000); State v. Faust, 93 Wn. App. 373, 376, 967 P.2d 1284

RCW 9.94A.533(3)(a).

(1998) (malfunctioning gun was still a firearm).²

Here, Detective Tim Arnold, the sheriff's office armorer, testified that he was unable to test fire the shotgun because the firing pin was missing. He also noted that the trigger housing had been tampered with, but he was able to manipulate it back into position without difficulty. He did not know if the gun had other problems that would prevent it from firing, but he believed the primary problem was the missing firing pin. Arnold acknowledged that the shotgun model was no longer being manufactured. But he testified that over two million copies had been made, and he estimated he could find a used firing pin in as little time as an hour. And once he obtained that part, he could install it in about an hour. Interpreting these facts in the light most favorable to the State, a rational jury could conclude that the shotgun was a firearm. Although it was apparently inoperable at the time of the crime, the jury could find that it could be repaired to become "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1).

The defendants also argue there is insufficient evidence that any of them were "armed" with a firearm. A person is "armed" if the firearm is "easily accessible and

² The defendants rely on a single sentence from State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) to argue that this interpretation is erroneous. There, the court noted, "We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement." Recuenco, 163 Wn.2d at 437. But this passing reference to operability does not address the core issue here—when the gun must be operable to qualify as a firearm. In State v. Pierce, No. 38377-2-II, 2010 WL 1685969 (Apr. 27, 2010), Division Two of this court cites Recuenco for the proposition that a gun must be operable during commission of an offense before a firearm enhancement can be imposed. But we do not read Recuenco to overrule the Faust line of cases.

readily available for use, either for offensive or defensive purposes.” State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Additionally, there must be a connection or nexus between the defendant, the crime, and the weapon. State v. Eckenrode, 159 Wn.2d 488, 490–91, 150 P.3d 1116 (2007).

The defendants argue that the shotgun was not “available for use” because it was inoperable during commission of the crime. But a person can use an inoperable firearm offensively by threatening people who do not know the weapon is not in working order. See, e.g., Faust, 93 Wn. App. at 374–75 (defendant pointed temporarily inoperable pistol at wife and was “armed” with a firearm for purposes of firearm enhancement); see also State v. Faille, 53 Wn. App. 111, 115, 766 P.2d 478 (1988) (noting that an unloaded gun can still be used to frighten, intimidate, and control people). Here, Molnar testified that he saw one of the defendants pull something out of the car that “looked like a gun, a rifle.” 2 RP at 228. He further testified that the man cocked the gun and pointed it at the door and that Molnar did not leave the trailer because he was scared. Interpreting these facts in the light most favorable to the State, sufficient evidence exists for a rational trier of fact to conclude that the defendants were “armed” with the shotgun.

Failure to Object to Admission of the Shotgun

The defendants next claim their trial attorneys’ failure to object to admission of the shotgun constitutes ineffective assistance. To demonstrate ineffective assistance of counsel, a defendant must satisfy both prongs of a 2-prong test. See State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). First, the defendant must establish that trial counsel’s

representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). And where a claim of deficiency rests on the failure to object to admission of evidence, a defendant must show that an objection would likely have been sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Further, matters that go to trial strategy or tactics do not show deficient performance, so the defendant must establish that there were no legitimate strategic or tactical reasons behind the attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001).

Second, the defendant must show that the attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. If the defendant fails to establish either prong, the court need not address the other prong. In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). There is a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Here, the defendants argue their attorneys should have objected to admission of the gun because it was irrelevant. They rely on Molnar's testimony that he did not believe it was the gun he saw from the security camera video. Relevant evidence is any evidence that increases or decreases the likelihood that a material fact (e.g., whether the defendants were armed with a firearm) exists. ER 401. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). The shotgun here satisfies this minimal test. It was found in a ditch by the roadside near where the car was stopped. Deputy Kempke testified

that Woods appeared nervous when he learned the gun had been discovered. And although Molnar did not recognize the shotgun as the gun he saw on the camera, he acknowledged that he did not see the gun closely. The jury could reasonably conclude that Molnar was confused about exactly what he saw but that the shotgun had been used in the incident that morning. The defendants' argument goes to the weight of the evidence, not its admissibility.

Additionally, there was a legitimate tactical reason to allow the gun's admission—so the jury could see its poor condition. This evidence bolstered defense counsels' argument that reasonable doubt exists as to whether it could ever be made operable to qualify as a firearm. For example, in closing argument Anderson's attorney emphasized the gun's problems and how badly it looked, referring to the gun they saw as "an old firearm, kind of falling apart, wasn't it?" 4 RP (Feb. 5, 2009) at 510. Although this strategy proved unsuccessful, it does not show deficient performance. Because the defendants do not show deficient performance, their ineffective assistance claims fail.

Jury Instruction on Unanimity

The defendants assign error to instruction 63 because it required the jury to be unanimous to answer either "yes" or "no" to the special verdict form on whether they were armed with a firearm. Instruction 63 provides in part,

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

The defendants argue this instruction is

erroneous because, under State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003), jury unanimity is not required for a special verdict to be final.

In Goldberg, the jury convicted the defendant of first degree murder but answered “no” on a special verdict form regarding an aggravating factor. Goldberg, 149 Wn.2d at 891. Yet when the trial court polled the jury, only one person indicated voting “no” on the aggravating factor. Goldberg, 149 Wn.2d at 891. The trial court concluded the jury was deadlocked and ordered continued deliberation, after which the jury returned with a “yes” verdict. Goldberg, 149 Wn.2d at 893. On appeal, our Supreme Court held this was error because a trial court has no authority to request a jury to continue deliberations on a special verdict, unlike when the jury is deadlocked on a general verdict. Goldberg, 149 Wn.2d at 894.

Anderson argues that Goldberg stands for the proposition that unanimity is required only for a jury to answer “yes” on a special verdict form, not to answer “no.” But in State v. Bashaw, 144 Wn. App. 196, 201, 182 P.3d 451, review granted, 165 Wn.2d 1002 (2008), Division Three of this court interpreted Goldberg more narrowly. It concluded that Goldberg’s holding was based on the specific instruction involved and that unanimity is required to answer “no” on a special verdict form.³ Bashaw, 144 Wn. App. at 202.

Here, we conclude that even if the instruction were erroneous, the error was harmless. The jury unanimously answered the special verdict “yes” and when polled,

³ Our Supreme Court has accepted review of Bashaw, and its decision is pending.

each juror confirmed the verdict. There is no indication that the jury was confused or that they were initially deadlocked. Unlike in Goldberg, the trial court did not order the jury to continue deliberating. Baxter and Contreras argue that the jury might not have unanimously answered “yes” if the trial court had specifically instructed them that “not unanimous” was an option. But this is speculation and insufficient to show prejudice.⁴ See State v. Pineda-Pineda, 154 Wn. App. 653, 226 P.3d 164, 171 (2010) (noting that “any confusion about a negative verdict [is] purely hypothetical”). Because the defendants here received a unanimous verdict, they demonstrate no harm from the instruction.

Accomplice Liability Instruction

The defendants argue the accomplice liability instruction was erroneous because it failed to require proof of an overt act. They rely on several cases holding that a defendant’s mere presence at the scene, even if combined with knowledge of or assent to the crime, is insufficient to establish accomplice liability. See State v. Renneberg, 83 Wn.2d 735, 740, 522 P.2d 835 (1974) (“physical presence and assent alone are not sufficient to constitute aiding and abetting” but being present and ready to assist is sufficient); State v. Matthews, 28 Wn. App. 198, 200, 624 P.2d 720 (1981) (evidence was sufficient where it showed that a defendant participated in the crime and committed at least one overt act); State v. Peasly, 80 Wn. 99, 100, 141 P. 316 (1914) (statute on aiding and abetting required “the doing or saying of something that either

⁴ Because Baxter and Contreras cannot show prejudice, their ineffective assistance of counsel arguments on this issue also fail.

directly or indirectly contributes to the criminal act”).

But the instruction here complied with this requirement. Instruction 9 provided in relevant part,

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

This instruction required the jury to find more than that the defendants assented to the robbery and were present during the crime. It required the jury to find they knowingly promoted or facilitated the robbery by aiding or agreeing to aid in its commission. The instruction correctly states the law.

The defendants also argue the evidence is insufficient to show they knowingly promoted or facilitated the robbery. They contend the evidence shows at most that they were present and had knowledge of the crimes. We disagree. Molar and Swofford testified that the defendants were running around the trailer and cars, one of them brandished a gun, two of them broke into one of the cars, and they all left in a small blue car. Molnar testified that they became “aggressive” and started “ranting and raving” when denied entry to the trailer. He said it looked like one of the men cocked the gun as though he was going to shoot at the door. The jury could reasonably infer

from this evidence that all five defendants arrived together, they knew about the gun from the car's small size, and they acted in concert to take Swofford's property by force or the threat of force. Woods asserts there was no evidence Swofford was prevented from knowing about the theft of her car stereo by the threatened use of force. But Swofford testified she was scared to leave the trailer because of the way the defendants were acting. Viewing the facts in the light most favorable to the State, sufficient evidence supports the jury's verdict.

The Robbery "To Convict" Instruction

The defendants argue that the "to convict" instruction for first degree robbery, combined with the accomplice liability instruction quoted above, allowed the jury to convict them as accomplices to robbery even if it actually found they were only accomplices to theft. An appellate court reviews a challenged jury instruction de novo, viewing it in the context of the jury instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Under RCW 9A.56.190, a person is guilty of robbery if he unlawfully takes personal property from another's person or in her presence against her will by using immediate force, violence, or fear of injury. And he is guilty of first degree robbery if he displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200. Additionally, a person is guilty as an accomplice if he "solicits, commands, encourages . . . or aids or agrees to aid" another in committing the crime if he does so "[w]ith knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a)(i)(ii). But to be liable as an accomplice, "a defendant must not merely aid in any crime, but must

knowingly aid in the commission of the specific crime charged.” State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889 (2002); see also State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69 (2005) (“[I]t is also clear now that the culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge.”). Thus, it would be error to instruct a jury that it could convict a defendant of robbery as an accomplice based solely on finding that the defendant agreed to aid his principal in committing a theft. See Trout, 125 Wn. App. at 410 (a defendant may not be convicted as an accomplice of a different crime than the one he knowingly sought to facilitate).

The defendants argue that instruction 15’s second element allowed that to happen here. It required the jury to find “[t]hat the defendant or an accomplice intended to commit theft of the property.” But the jury could not convict the defendants based on only this element. The “to convict” instruction also contained the other elements of robbery, including a requirement “[t]hat force or fear was used by the defendant or accomplice” to accomplish the theft. Reading the instructions in context, the jury was properly told that to convict the defendants of robbery as accomplices, it would have to find that they knowingly promoted or facilitated the crime, i.e., robbery, by aiding or agreeing to aid in its commission. And because the robbery “to convict” instruction required not only an intent to commit theft, but also the use or threatened use of force, the instructions did not enable the jury to convict the defendants of robbery simply by finding they agreed to aid in a theft.⁵

⁵ Anderson argues that his attorney was ineffective for failing to request a lesser included instruction of third degree theft. But his argument is predicated on his flawed reading of the “to convict” instruction, so we reject it.

The defendants also rely on State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002) to argue that the instruction is incorrect. In Grendahl, a jury convicted the defendant of first degree robbery on an accomplice liability theory. The principal testified that he had heard employees of a particular store left their purses in an unattended room and he went to the store to “look around” while Grendahl waited in a car. Grendahl, 110 Wn. App. at 907. However, he ended up taking a woman’s wallet from her person by force, after which he ran to the car. Grendahl, 110 Wn. App. at 906. There was no evidence Grendahl had agreed to assist in a robbery as opposed to theft. Grendahl, 110 Wn. App. at 906–08. Yet the prosecutor argued this was immaterial because “those elements talk about the intent to commit a theft, not the intent to commit a robbery” Grendahl, 110 Wn. App. at 909. The court held this was error and reversed the defendant’s conviction.⁶

This case is not like Grendahl. Here, there was sufficient evidence from which the jury could find the defendants agreed to aid in taking Swofford’s property and that they did so knowing that the taking would be accomplished by the use of force or threatened use of force. And the prosecutor did not argue it would be sufficient to convict if they merely intended to take her property even if they did not agree to assist in a forceful taking. Instruction 15 is a correct statement of law, so we reject the defendants’ argument.

⁶ While the Grendahl court couched its decision in terms of instructional error, we agree with the State that the lack of evidence and improper argument justified the court’s reversal rather than the language in the “to convict” instruction at issue.

First Amendment

The defendants argue the accomplice liability statute, RCW 9A.08.020, is facially unconstitutional because it criminalizes speech that is protected under the First Amendment. A statute is unconstitutionally overbroad on its face if it prohibits a substantial amount of protected speech activities. City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). But a statute that regulates behavior rather than purely speech will not be overturned unless the over breadth is both real and substantial when compared to the statute's plainly legitimate sweep. City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

Under RCW 9A.08.020(2)(a), a person may be convicted as an accomplice if “[w]ith knowledge that it will promote or facilitate the commission of the crime” the person aids or agrees to aid another in planning or committing the crime. The defendants argue that this language is overbroad because the statute does not define the word “aid” to ensure that the mere advocacy of criminal activity is excluded. They point out that under Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), states cannot “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg, 395 U.S. at 447. Thus, they argue, journalists who cover terrorism could be considered criminal accomplices because terrorism depends on publicity. Winter’s Opening Br. at 17.

But in Brandenburg, the Court drew a distinction between “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence” and “preparing a group for

violent action and steeling it to such action.” Brandenburg, 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961)).

Here, the accomplice liability statute does not criminalize the mere advocacy of criminal actions in the abstract. It requires an accomplice to knowingly promote or facilitate a specific crime by assisting in its planning or commission. Thus, the statute complies with Brandenburg’s requirement that the advocacy of criminal activity itself not be criminalized. Because the defendants fail to show that the accomplice liability statute reaches a substantial amount of protected speech in relation to its legitimate sweep, we reject their over breadth challenge.

Double Jeopardy

The defendants argue that the use of deadly weapon enhancements, in combination with first degree robbery (an element of which is use of a deadly weapon), violates double jeopardy. But this argument fails under our Supreme Court’s recent decision in State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010).

Right of Confrontation

Anderson, Winter, Contreras, and Baxter argue that their right of confrontation was denied when Deputy Simper testified that Woods told him someone in the car’s back seat passed him the gun and told him to throw it out the window. In criminal prosecutions, a defendant has the right to confront the witnesses against him or her. U.S. Const. amend. VI; Washington Const. art. I, § 22 (amend. 10). And in Bruton v. United States, 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Court held that this right is violated when a nontestifying codefendant’s confession implicating the defendant is admitted—even if

accompanied by an instruction not to use the statement against the defendant. The defendants argue their confrontation rights were violated here because Woods did not testify, so there was no opportunity for them to cross-examine him and the jury could have disregarded the instruction not to use this statement against them.⁷ The State concedes error but argues the error was harmless. Confrontation clause error is subject to harmless error analysis. State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007).

We agree that the error was harmless in this case. All of the defendants except Woods were acquitted of the unlawful firearm possession charge, so they cannot show Woods's statement harmed them with respect to that count. As to the firearm enhancement, overwhelming evidence linked the gun to the defendants apart from Woods's statement. Molnar testified he saw one of the men pull a gun out of the car, and Swofford testified that she saw the defendants leave together in the car. They both recognized Woods, Contreras, and Winter. Deputy Simper described the car as "[v]ery small, compact" and the defendants as "crammed together." 1 RP (Feb. 2, 2009) at 96. He testified that he found the gun in a ditch when he searched the area by the car later that morning. Deputy Kempke testified that Woods appeared nervous when he learned the gun had been discovered. Given this untainted evidence linking the gun to the defendants, they fail to show how Woods's statement harmed them.

Due Process

⁷ The trial court instructed the jury, "You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant."

The defendants also claim the State violated their right to due process when it failed to adequately prove their prior convictions. At sentencing, the State provided the court a written summary of each of the defendants' criminal histories. It was signed by the senior deputy prosecuting attorney and included the date of the crime, the date of sentencing, and the county where the sentencing occurred. None of the defendants objected to the State's summary. On appeal, the defendants do not challenge the accuracy of the State's summary. Nevertheless, they argue that the summary is constitutionally insufficient under State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999) because it amounts to nothing more than a "bare assertion," unsupported by evidence.⁸

In Ford, the defendant challenged the prosecutor's calculation of his offender score at sentencing. He did not dispute the existence of three California convictions, but he argued they should not count toward his score because they resulted in only civil commitment. Ford, 137 Wn.2d at 475. The State orally asserted that they would be classified as felonies under comparable Washington law but failed to introduce any evidence to support this assertion. Ford, 137 Wn.2d at 475–76. The court noted, "California statutes under which Ford was convicted were not offered into evidence," "[n]o comparable Washington statutes were identified," and the trial court apparently "did not engage in any comparison of statutory elements." Ford, 137 Wn.2d at 475–76. On appeal, the State conceded that it failed to introduce evidence to support its

⁸ A challenge to a defendant's criminal history relied on by the sentencing court can be raised for the first time on appeal. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

classification of the convictions but blamed the defendant's failure to specifically object at sentencing. Ford, 137 Wn.2d at 475–76. It argued that a timely objection would have allowed it to develop the record to support its classification. Ford, 137 Wn.2d at 478.

The court rejected this argument, concluding that it “fail[ed] to recognize the State’s duties and obligations under the [Sentencing Reform Act].” Ford, 137 Wn.2d at 479. The court emphasized that the SRA required a sentencing court to classify a defendant’s out-of-state convictions according to comparable Washington offenses as a mandatory step in the sentencing process. Ford, 137 Wn.2d at 479, 483. It also noted that the SRA required a defendant’s criminal history to be proved by a preponderance of the evidence. Ford, 137 Wn.2d at 479–80. And it explained that while the SRA allowed the sentencing court to rely on information contained in the presentence reports if “acknowledged” by a defendant’s failure to object at sentencing, this did not extend to “bare assertions” by the prosecutor regarding the defendant’s criminal history. Ford, 137 Wn.2d at 483. Because this “acknowledgment” provision of the SRA was inapplicable and there was no evidence to show that Washington law would have classified the disputed California convictions as felonies, the SRA did not authorize the sentence imposed. Ford, 137 Wn.2d at 485.

In 2008, the legislature amended the SRA in response to Ford and other recent sentencing cases “in order to ensure that sentences imposed accurately reflect the offender’s actual, complete criminal history” Laws of 2008, ch. 231, § 1. It amended RCW 9.94A.500(1) to allow a prosecutor to prove a defendant’s criminal history by submitting a “criminal history

summary,” which “shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500(1). And it amended RCW 9.94A.530(2) to allow a sentencing court to rely on this summary if not objected to by the defendant, just as it had been allowed to rely on information contained in a presentence report.

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.

Laws of 2008, ch. 231, § 4(2) (new language emphasized).

The defendants argue that these amendments violate due process because Ford established a constitutional rule that the State must prove a defendant’s prior convictions—presumably by obtaining judgment and sentence forms for every prior conviction—regardless of whether the defendant objects to the State’s summary.⁹ They point to language in Ford, observing that the State there not only failed to meet the SRA’s preponderance standard, but also failed to comply with even the minimum requirements of due process, which prohibit a defendant’s sentence from being based on “information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” Ford, 137 Wn.2d at 481–82.

But the issue in Ford was whether the State’s bare assertion that the defendant’s

⁹ The defendants also broadly assert that their Fifth Amendment privilege against self-incrimination has been violated, but they cite no authority that would support this argument. Moreover, it is not clear how the privilege is implicated here. The statute does not require a defendant to produce evidence that would incriminate himself or increase his punishment. We reject this argument.

out-of-state convictions would be classified as felonies in Washington, combined with the defendant's failure to specifically object to that assertion, was sufficient under the SRA to authorize the sentence imposed. Relying on SRA procedural requirements for analyzing comparability, the court held that it was not. While the court discussed the minimal requirements of due process at sentencing, it also emphasized that its conclusion should not be construed to place a heavier burden on the State than was required by the SRA. Ford, 137 Wn.2d at 482. We conclude that the holding in Ford was based on the SRA rather than the principle of due process.

Here, the trial court sentenced the defendants in compliance with the SRA. The State's criminal history summary was prima facie evidence of the defendants' prior convictions.¹ RCW 9.94A.500(1). And the defendants acknowledged the information it contained by failing to object.¹¹ RCW 9.94A.530(2). We reject the defendants' due process challenge.

Anderson's Statement of Additional Grounds Issues

Anderson raises several additional arguments in a pro se statement of additional

¹ In a footnote, the Ford court stated, "[A] prosecutor's assertions are neither fact nor evidence, but merely argument." Ford, 137 Wn.2d at 481 n.3.

But by determining that the prosecutor's summary constitutes "prima facie evidence," the legislature has indicated that the prosecutor's criminal history summary at sentencing is more than mere argument. The prosecutor's summary here appears to be based on computer records of the defendants' criminal histories, which provides "a minimum indicia of reliability." Ford, 137 Wn.2d at 481.

¹¹ Under the amended version of RCW 9.94A.530(2), the State's criminal history summary is treated in the same way as information contained in the presentence report, the use of which was approved in Ford. The defendants fail to explain why there should be any constitutional difference between criminal history summaries and presentence reports.

grounds. He contends there is insufficient evidence to support his robbery conviction because the jury acquitted him of attempted burglary. But burglary involves unlawfully entering or remaining in a building, which is not an element of robbery. RCW 9A.52.020; RCW 9A.56.200(2). Here, a rational jury could have found the elements of robbery without finding that the defendants attempted to enter Swofford's trailer. He also argues that the victims "did not view a theft, they viewed the entering of a vehicle." Statement of Additional Grounds at 16. But the jury could infer that the defendants entered the vehicle to take Swofford's property, especially considering that they found the car's stereo missing soon after the defendants left. And he contends there was no use of force or threatened use of force because the "defendant's did not cuss, threaten, or even raise their voice." Statement of Additional Grounds at 17. But Molnar testified that he saw a gun, and Swofford testified that she was scared because of the way the defendants were behaving. We reject Anderson's insufficiency arguments.

Anderson also contends he received ineffective assistance of counsel because his attorney did not move to sever pursuant to CrR 4.4. He argues that he was prejudiced by Woods's statement that someone passed him the shotgun and told him to throw it out the window. But as discussed above, there was ample evidence aside from Woods's statement linking the shotgun Deputy Simper found to the other defendants. And the jury acquitted Anderson of unlawful firearm possession.

Next, Anderson argues that the "show-up" identification procedure was impermissibly suggestive and should have been suppressed. But show-up identifications are not per se

unconstitutional, and Washington courts have recognized them as a legitimate part of a prompt search for a suspect shortly after the commission of a crime. State v. Springfield, 28 Wn. App. 446, 447, 624 P.2d 208 (1981). Moreover, here, the victims failed to identify Anderson at the scene, which his attorney relied on in closing argument. This argument fails.

Anderson also argues the initial stop was an illegal seizure. But under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer may briefly stop a vehicle to investigate criminal activity if the officer can “point to specific and articulable

facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21. Here, Deputy Simper was responding to a “man with a gun” 911 call from named citizen informants who reported that a large group of men had just left his residence in a small blue car. He saw a car fitting this description with multiple occupants crammed inside driving away from the scene. Under these circumstances, Anderson fails to demonstrate that the Terry stop was improper.

Finally, Anderson claims the prosecutor engaged in misconduct by telling a witness to “shut the hell up” and that the trial court deleted this statement from the record to prevent our review. But he offers nothing other than his own assertions to support this claim, so it also fails. See State v. Miller, 40 Wn. App. 483, 488, 698 P.2d

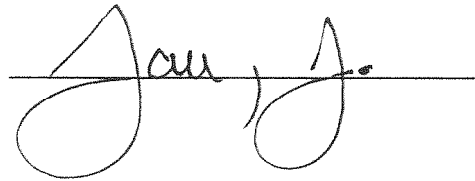
1123 (1985).

Cumulative Error

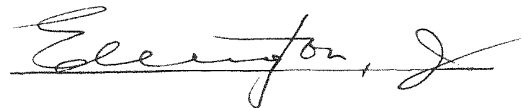
Finally, the defendants argue that cumulative error denied them a fair trial. The cumulative error doctrine applies only when several trial errors occurred which, by themselves, may not be sufficient to justify a reversal, but when combined together, effectively deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). But where a defendant fails to show prejudicial error occurred, he is not denied a fair trial. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005);

State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Because the errors in this case were harmless, reversal is not warranted.

Affirm.

A handwritten signature in black ink, appearing to read "J. J. Leach", written over a horizontal line.

WE CONCUR:

A handwritten signature in black ink, appearing to read "Leach, a.c.j.", written over a horizontal line.A handwritten signature in black ink, appearing to read "Eberhart, J.", written over a horizontal line.